THE
MADRAS LAW JOURNAL

II] JULY [1937

INDIAN FEDERATION.

Law was the possession of clerics in both East and West and has affinities with scholasticism in the west and its equivalent the *mimamsa*, in the east. Law and scholasticism are alike in the native temper of the average Indian intellectual. Politics has, for some time, been, and at the moment is, our major preoccupation. The Government of India Act and all the legal and quasi-legal and political questions arising from it engage much of our attention. That part of the Act that relates to the Federation of the States and Provinces has a peculiar fascination for the lawyers. It has a juristic interest for them. Their *mimamsa* has full scope for exercise. Constitutional law and the dubious territory that lies between it and international law justly claim both their interest and attention. One of the vigorous and thoughtful contributions to the elucidation of this topic of Federation is now before us. The author, Mr. N. D. Varadachariar, one of our young intellectuals, delivered three lectures on the topic under the auspices of the Madras University in March, 1936. They have since been made available to the public in the form of a book of over one hundred and fifty pages published by the Oxford University Press under the title, " The Indian States in the Federation ". Though we may not agree with all the viewpoints of the author, his book must be recognised as an able contribution to the study of a knotty subject. The author wields an attractive and persuasive style. His book deserves the attentive study of all who are interested in politico-legal thought and furnishes a good introduction to the study of the Indian Federation.

No one is likely to enthuse over the Indian Federation in the Act. Its weak points are well brought out in the book,

Few will disagree with the author's estimate of its character. In one passage he had almost pronounced it to be no real Federation at all. That it is unlike any Federation hitherto known cannot be gainsaid. It lacks symmetry. The relation between the Federation and its component units is unequal. The States do not occupy, in relation to the Federation, the same position as the Provinces. Even the States need not all bear the same relation to the Federation. Their instruments of accession may vary in terms. These instruments do not stop with their primary function of bringing the States into the Federation. They remain to regulate and control the further development of the Federation. While the Imperial Parliament can amend the Act as to the Provinces in any manner they like, they cannot amend it in regard to the States except within the limits authorised by the instruments of accession. While the States that enter the Federation have no right to secede from it at any time at their option, it is possible that, in conceivable circumstances, they may be thrown out of the Federation. The people of the States are nowhere in the picture and had no say in the matter. They are within the Federation, but are, in every respect, represented by the Princes. They have no direct relation with the Federation. These and other peculiar features to which the author refers in detail amply justify his criticism. The peculiar character of the Federation is, without doubt, due to the fact that the Indian Princes, the Imperial Parliament and the British Indian Peoples had different aims and ambitions and purposes to serve and pulled different ways. The Indian nation that the author refers to in some passages does not yet exist even in embryo. The ultimate unification of India and establishment of Indian freedom figured in the talks as the goal, but had very little influence in the shaping of the actual conduct of the parties concerned. This Federation will probably remain for ever unique and in a category all by itself.

In the exposition of the unique character of the Federation and of the contending forces that gave it that character, the author has left nothing unsaid; but in the course of the disquisition he makes some points of a very controversial character. These points revolve round the three words "Sovereignty," "Treaty" and "Federation." Before I advert to these points, I wish to make some general observations calculated to indicate the nature of my criticism.

I think it is Mr. H. G. Wells that says somewhere that lawyers are more concerned with words than with things or facts. The first reaction to the criticism is naturally angry repudiation in the minds of lawyers. It does seem at first sight strange and inexplicable how that impression arose in relation to a profession which is concerned with the most real thing as the world understands it. Not having the passage at this moment, I cannot say what the provocation was for that comment. Occasionally however when we come to consider some basic or fundamental conceptions, discussion may, and often does, take a form which, if it does not justify the sweeping criticism, at any rate, explains how an adverse critic came to form that impression. Terms and meticulous definitions may dominate the discussion and essential facts may be lost sight of.

The next observation I desire to make is that the Indian lawyer is apt to measure and estimate all facts in the light of the categories of English Jurisprudence. Austin's analytical jurisprudence holds us still in its grip. There is something rigidly precise and logical in analytical jurisprudence that captivates the scholastic temper of the theoretic lawyer. But it is based upon the limited facts of a phase of life and institutions in one part of the west. When life moves on, confronts new situations, adapts itself to them by new devices, political and legal, and new laws emerge, jurisprudence must expand so as to accommodate itself to the new facts. Take, for example, the condition of the Commonwealth after the Statute of Westminster. The old law *seems* to remain the same, but the situation is wholly altered. In legal theory the Parliament can repeal the Statute and alter the constitution of each Dominion. But by convention based on express agreement embodied in the Statute, it is prevented. Thereby new conventions capable of transcending and controlling law have emerged. Even the conception of the origin of conventions and of their power and efficacy—I refer to it because it has come into current controversy—has become altered. Our juristic notions have all to be overhauled in the light of the new devices to meet a new situation. This is in reference to the changing facts of one and the same country.

This principle which has to be recognised in regard to the evolution of legal phenomena in the same country suggests

caution in applying the notions of British jurisprudence to another country. As notions may be common to all laws, there are bound to be elements in a jurisprudence that are of universal validity and application. There may be elements of wide, but not of universal, application. There may also be elements that cannot be applied without considerable reservations to other countries with totally different sociological conditions and therefore with differing institutions and differing laws and basic conceptions. When we get to a country like India with institutions and facts of life unlike any in England, either the notions of jurisprudence have to be expanded so as to subsume all the new facts under its widened categories or it must be clearly recognised that it is not legitimate to draw upon it except for broad analogies and comparisons. *In any case, the new facts of one country cannot be compelled to accommodate themselves to the theories of a foreign jurisprudence erected on its own limited facts.*

Another point cognate to what has been said above is this. It is illegitimate to describe an institution of one country by a term of description applied in another country and then base on the connotation of that word of description notions as to the character which it ought to possess totally inconsistent with its known character. This will be accepted as obvious without argument. But we are all of us prone to slide into it all unconsciously. What is at first utilised merely as a rough and sufficient description is afterwards founded on, for drawing inferences which do not follow.

These three points of reflection and criticism which are really three phases of the same point arise in my mind as I try to understand and follow the viewpoints of the author. Incidentally, one may remark that these weaknesses are not peculiar to law but are exhibited in most other spheres of thought as well, and they require to be carefully watched and excluded. I must now make good these points of criticism that I have taken the liberty to make.

First there is the question whether the Indian State has sovereignty. I consider it to be largely a question of terminology. No claim of the Princes really depended on the definition of "Sovereignty" or "Federation." No enlightenment as to the true meaning of those words, as conceived by the

author, would have persuaded the Princes to abate or give up any of their claims. At some remote past they possessed what might be called sovereignty with all the powers it included. If some of these powers have been given up by them, or taken away from them, the remaining powers are conceived and treated by them as a remnant of their *sovereignty*. Whether they are right or wrong in thinking that these remaining powers could be described as their sovereignty, they wished that as little of their existing powers as possible should be taken away from them for the purposes of the Federal Government. They may be criticised for not agreeing to surrender more, but the definition of sovereignty or Federation had little or nothing to do with their attitude. The Princes often enough referred to their sovereignty, but their claims related not to any powers as flowing from their notion of sovereignty, in the abstract, but to specific existing powers. If they had been persuaded that they had no sovereignty in the juristic sense and that after they joined the Federation and surrendered some powers to the Federal Government, they had even less of sovereignty left in them, it would not, in the least, have affected their claims. They would still have said: "Never mind whether we have sovereignty or not; do not take away these powers from us." The trouble did not arise from any false conception of sovereignty which was either their own, or induced by the exposition of the Lord Chancellor, but from the unwillingness of the Princes to give up their powers for securing the lasting and ultimate interests of themselves and of India as a whole.

In the desire to deny and confute the claim of sovereignty, the author has fallen into an opposite extreme. I take it to be granted that the Imperial Parliament cannot legislate for Indian States. The Privy Council, which has general jurisdiction to hear appeals from all parts of the Empire, cannot hear appeals from the State Courts. The judgments of the State Courts are foreign judgments in British India even as the judgments of the British Indian Courts are foreign judgments in the State. The internal administration of the States is in the hands of the Princes. Thus the legislative, judicial and executive functions of the States are their own. Such interference as there may be is only political and private except in regard to criminal cases and death sentences in some States. It may be fair to say that the surrendered powers leave them no status as international

entities independent of Britain, *vis-a-vis* foreign States. But does that justify the assertion that the States or the rulers of States are *British subjects?* I know of no principle of law or jurisprudence that compels a classification of the Indian States either as British subject or as independent, but not as being neither. Every one who has attempted to describe the relation has characterised it as *sui generis* defying classification under known categories. Their attempt has always been to suggest nearest analogies. The author is aware of these differences of opinion and refers to them. Sir Frederick Pollock advises resort to the analogies of international law as likely to be persuasive. But, notwithstanding all this, the author does not hesitate to say that—

the States "are no more than subjects of the Crown" (p. 48).

the States "are subjects to all intents and purposes" (p. 49).

their assertion of formal sovereignty enables the crown to affirm that its dealings with them are acts of State (pp. 48-9).

the real anomaly in the position of the States lies in this, that these subjects of the crown are not under the protection of the law (p. 61).

the States are "delegates of the crown" or "royal instruments" (pp. 55, 61, 63).

Firstly, the phrase "subjects to all intents and purposes" is an admission that they are not subjects of the crown in strictness. Secondly, if one is really a subject, can any assertion of one party or the other take away the jurisdiction of the Courts on a matter between sovereign and subject? If no assertion can take away the jurisdiction, will the author maintain that the validity of an action of the British Government in relation to a State can be examined in the British Courts? That it cannot be examined has been already decided by the Privy Council in the case of the Tanjore Raj which the author himself refers to. Lastly, will the author maintain that the rulers of States, being mere *delegates* or *instruments* of the crown, may be put aside, as agents may be in law?

What is a mere aid to understanding should not be used to limit the thing to be understood.

Paramountcy and the indefinite extent of control which it involves, just like superior military power among independent States, are not foundation for any *legal* conclusion.

As for the theory of indivisibility of sovereignty, much may be said in its favour but more may be said against it. In the last analysis it is a matter of terminology.

Where the powers of a Federated State are divided between the centre and the component units and neither can trench on the territory reserved for the other, where is the sovereignty to be located? Modern opinion is in favour of treating sovereignty as divisible. Indivisibility is stated to be the result of limited observation. And federations are specifically referred to as showing its divisibility. Either it has to be treated as divided between them or, if indivisibility is to be preferred as the proper theory, one has to find an escape in positing the sovereignty as being in the centre and in the component states jointly. One has to say that sovereignty cannot be divided, but powers may be, and that where powers are divided and neither can trench on the other's powers, sovereignty is not with either but in both together, conceived as one body, or in the People as whose representatives the centre and the units hold the divided powers. The point on which the theory of indivisible sovereignty fails is that the omnipotence or omni-competence demanded for sovereignty is not to be found in any one body. There are modern complicated political structures which do not admit of the exact location of sovereignty.

Next take the word "treaty". The author speaks as if the essence of a treaty is that it could be broken. The Indian States prefer the word *treaty* as involving a recognition of equality between the parties to it and as adding to their dignity. The British Government allow it freely enough where they do not consider that anything turns on it, but repudiate the term when they wish to assert their unquestionable superiority. They have clearly provided in the Act, and Sir Samuel Hoare has explained, that the Princes cannot be coerced to accept what their Instruments of Accession have not conceded. (S. 101) As for the term 'treaty' involving repudiability, independent states repudiate where they can repudiate with impunity and keep to its terms where they cannot sustain repudiation by their military might. There is no lack of desire among the Princes to repudiate what will not suit them; but repudiation is not in their power. The British Government are too mighty for the Princes, individually or collectively, to defy. That the British have the might to abolish a State, if they so desired, or to compel it to act according to their dictates is obvious; but can it be contended that we can build legal conclusions on it justifying the

compulsion of the rulers to do what the British Government dictate?

CALCUTTA * DEPARTMENT OF LAW * NOT TO BE REMOVED

Let us next take the question of Federation. At every turn the author considers whether the Indian Federation would satisfy the conception of Federation strictly so called. Even Professor Willoughby recognises deviations from the rule of equality and proceeds to cite the example of the German Empire, thereby indicating that he takes even confederation to be a form of Federation. In dealing with the Indian Federation the author in one passage goes so far as to say that the constitution was not a federal constitution in the real sense. But he immediately gets over it with the reflection that paramountcy is there to save the Federation. That is to say, though under the provisions of the Act no amendment of the constitution was possible beyond the limits set by the Instrument of Accession, the paramountcy of the Crown may be used to enable Parliament to transcend them. If paramountcy can help to impose an amended constitution on the States without their consent, then why is an Instrument of Accession at all required in the first instance to bring them into the Federation. Parliament could have used the Crown's paramountcy to impose this very Government of India Act, without all the complications arising from the need to secure assent through various and varying Instruments of Accession. The British Government are now pressing them to join the Federation, because, I suppose, it is in the interests of all India as well as in the interests of Britain. Some have asserted that what is in British interests is also in the interest of all India. Why should not the Paramount Power impose the Act on the States in the exercise of their paramountcy, for the benefit of all concerned? If Instruments of Accession are now required, why is not a new assent, likewise, required to an amending legislation not covered by the initial Instrument of Accession?

There is a fallacy in the argument that as soon as the States have, by their Instruments of Accession, decided to come into the Federation, they have passed into the orbit of Parliamentary legislation and the last remnant of sovereignty in the States is destroyed. If the implication is, as it must be, that the legislative sovereignty has passed to Parliament, why does Parliamentary legislation still stand limited by the Instrument of Accession? If Parliamentary legislation is

Department of Law Library
Acc. No. 120283
C. U.

limited by the Instrument, why is it not indubitable proof that the powers of Parliament are both derived from, and limited by, the Instruments of Accession? If that is demonstrably the fact, it cannot be got over either by considering what a true Federation should be and involve, or by a reflection on the saving character of paramountcy with its expansive and expansible jurisdiction, or even by explaining away the limitations on the power of amendment as mere procedure.

The expansible paramountcy is only another name for the irresistible might of the British arm on which no legal argument should be founded. Nor is it right to rely on the power of Parliament to transcend limits set by its own predecessors. Parliamentary legislation *within its own sphere* is not bound by any limitations on its powers imposed by previous legislation. This legislation, however, is not within its own sphere; nor are the limits those set by a previous Parliament. They are limits arising from the rights of States admittedly not subject to Parliamentary legislation now.

P 2336

We have now constitutional analogies to disprove the validity of the argument from power. The Imperial Parliament can legally repeal the Statute of Westminster. And yet it is in the last degree improbable if not impossible. Can it be said that the equality of the Dominions and Britain which that Statute establishes can be denied, because of this theoretic legal power?

The States have a higher case than the Dominions for their claim, because Parliament never had any legal power over the States, as they had over the Dominions.

If this is not a Federation according to the author except for the existence of paramountcy and the power of coercion it confers, the proper view is to treat it as no Federation in the strict sense but as a Federation in a sense, that is, in a separate category by itself. The real facts about the Indian Federation cannot be ignored or slurred over in order to find a place for it within the category of Federations strictly so called.

When one comes to think of it, it is rather suprising that paramountcy should be relied on as a force on the side of India or as compensating for defects in the Government of India Act. Paramountcy in the British Crown is what will always be a stumbling block in the way of Indian unity and the development of the Federation. If Britain considers the States

to be a bulwark for the preservation and perpetuation of her interests, paramountcy will not be used to advance Indian interests exclusively where they conflict with British interests. There is a point at which British and Indian interests will always diverge and conflict, and paramountcy cannot help India as against Britain. Far from helping the Federation to its ultimate goal as India sees it, paramountcy will ever be in its path. Without breaking the present conception of paramountcy, India can never come into its own. Paramountcy *may* abolish itself even as Imperial Parliament has abolished itself in relation to the Dominions and has created a Commonwealth. Political wisdom may dictate the one, as it has dictated the other. But there are thinkers that hold that what Britain has chosen to do for the people of her own stock, she will not do for the people of India. Be that as it may, we are here concerned only with this, that unless paramountcy stands abolished *in fact*, even if not in theory, just like Parliamentary Supremacy in relation to the Dominions, the political unification of India involved in the conception of Federation will not be complete.

T. R. VENKATARAMA SASTRI.

SUMMARY OF ENGLISH CASES.

In re ANDREW: *Ex parte* OFFICIAL RECEIVER (TRUSTEE), (1937) 1 Ch. 122.

Insolvency—Bankruptcy Act, 1914, *S.* 40, *sub-S.* (1)—*'Benefit of execution', meaning of—Amounts recovered towards decree—Balance due—If recovered amounts can be claimed back.*

A creditor obtained a decree against the debtor and on the same day took out a writ of *fi. fa.* and seized the debtor's goods in execution. An arrangement was then entered into between the creditor, the debtor and the Sheriff's officer, under which possession of the goods seized was to be given up by the sheriff's officer to the debtor on condition that a portion of the decree amount was forthwith paid over before delivery and the balance should be paid in certain monthly instalments. The sheriff was to have the right of re-entry under the writ in case of default by the debtor in payment of any instalment. The debtor paid the first payment and three instalments but as there was default in subsequent instalments the sheriff seized the goods and sold them. But as

before the sale proceeds were paid over to the creditor, a receiving order was made against the debtor on his own petition, the sheriff paid over the sale proceeds to the trustee in bankruptcy. But the trustee claimed payment of the sums paid over to the creditor previously as the "benefit of the execution" within the meaning of S. 40, sub-S. (1) of the Bankruptcy Act, 1914. The section says that "Where a creditor has issued execution against the goods or lands of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor."

Held, that "the benefit of the execution" does not refer to moneys actually received by the creditor in whole or partial satisfaction of his debt, whether under or in consequence of an execution or not, but that the words refer to the charge which the creditor obtains by the issue of the execution, and that to the extent that by the payment of moneys that charge has been reduced or abrogated, there is *pro tanto* no benefit of the execution to be considered. The fact that the sheriff when he withdrew reserved the right of re-entry on default does not bring the case under S. 40, sub-S. (1). The words are "benefit of the execution" and not "any benefit from the execution" or "any benefit arising out of the execution". To the extent to which the debt has been actually discharged, it is impossible to apply to money so paid the appellation of "the benefit of the execution". The money so paid becomes the money of the creditor with the result of wiping out *pro tanto* the debt. The trustee cannot therefore claim back such sums.

In re A JUDGMENT-DEBTOR, (1937) 1 Ch. 137.

Insolvency—Decree against debtor—Debtor going out of country bona fide*—Notice to debtor's solicitors of a bankruptcy notice—If valid notice against the debtor.*

A decree for money was obtained against an aviator, who a few days after the decree left England by air to a distant place. The decree-holder through his solicitors sent a letter to the debtor's solicitors intimating to them that a bankruptcy notice had been issued against the debtor and asking for "an early appointment to serve him (debtor) with a copy thereof". The debtor's solicitors intimated that the debtor had left the place and could not be served and that he was expected to be back in a few weeks. Nevertheless the creditors got from the Registrar an order for substituted service making the requisite allegations against the debtor of intent to defeat or delay the creditors, which was found to be unjustified and intimated that order to the debtor's solicitors and to the place of

debtor's business in London. This bankruptcy notice required that the notice should be complied with within seven days.

Held, that it is not a notice to the solicitors but a notice to the debtor care of his solicitors, which is no more than another way of giving him notice at a different address. The solicitors cannot be sufficient agents for this purpose. It is he and not his solicitors that has to decide whether he will pay the debt and the notice giving a week's time within which the creditor knew the debtor will not return is an insufficient notice. A person shall have effective notice, if it be possible, of any process instituted against him in the courts and certainly none the less because that process is a bankruptcy process.

In re LEIGHTON'S CONVEYANCE, (1937) 1 Ch. 149.

Mortgage—R. S. C., O. 16, r. 28 and O. 65, r. 1—Costs of mortgage action—'Poor person'—Costs against—If can be added to the security.

It is the ordinary right of a mortgagee to add to his security all costs, charges and expenses reasonably and properly incurred in ascertaining or defending his rights, and in recovering the mortgage debt. It is not really a matter which arises in connection with the awarding of costs. Under O. 16, r. 28, R.S.C., "no poor person shall be liable to pay costs to any other party". Where therefore a mortgagee's title is attacked by somebody who is a stranger to the mortgage and the mortgagee is obliged to defend it, the mortgagee is entitled to add the costs to the security, though the plaintiff might have got leave to sue as a poor person; for there is no question of the poor person being ordered to pay any costs but only an order that it shall be added to the security, so that subsequent mortgagees, etc., may not escape liability for the costs.

WILLOUGHBY *v.* ECKSTEIN, (1937) 1 Ch. 167.

Easement—Light—Prescription—Two adjoining premises owned by one person—Lease of one to A—Lease reserving expressly right to build on next site so as to obstruct light to A—Later lease of the other site to B—Building by B obstructing light to A—A having enjoyed light for over statutory period before B's building—If building by B can be restrained—Effect of agreement reserving right to obstruct light—Prescription Act, 1832, S. 3—'For that purpose' in S. 3, meaning of.

The plaintiff and defendant were lessees of adjacent buildings from a common landlord. Some of the windows in the plaintiff's premises face the defendant's premises and they were enjoyed by him for over the statutory period. The defendant raised the height of his building to a greater height than before with the result that the plaintiff's windows were obstructed. The lease in favour of the

plaintiff conferred on the plaintiff certain rights of way and user over defendant's premises and added the term "but without including any rights of light or other easements over other ground or premises and subject nevertheless to all rights and easements belonging to any adjacent property and subject to the adjacent buildings or any of them being at any time or times rebuilt or altered according to plans both as to height, elevation, extent and otherwise as shall or may be approved of by the ground landlord for the time being." The plaintiff brought an action to compel the defendant to remove the obstruction to light and air under S. 3 of the Prescription Act, 1832. The section says that "when the access and use of light to and for any dwelling house . . . . or other building, shall have been actually enjoyed therewith for the full period of 20 years without interruption, the right thereto shall be deemed absolute and indefeasible . . . unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Held, that in the absence of an agreement excluding the operation of the Prescription Act, where two tenements are held by different lessees under a common landlord and one lessee has enjoyed the access and use of light in respect of his tenement over the other tenement without interruption, that lessee acquires an absolute right to light as against the other tenement. This right enures in favour of that lessee and his successors, not only as against the other lessee but also against the common landlord and all succeeding owners of the other tenement. But here there was the agreement in the lease to the plaintiff which contained an express exception out of the demise of any right to light in respect of the demised premises, the effect of which was to make the enjoyment of light by the plaintiff in respect of the leased premises only a permissive one throughout the whole of the term of the lease.

LONDON, MIDLAND AND SCOTTISH RAILWAY COMPANY *v.* GREAVER AND ANOTHER, (1937) 1 K.B. 367.

Railway—Bye-law—Prohibition against transfer of a partly used ticket—How for valid—Ultra vires—*When a bye-law is* ultra vires.

A railway issued certain concession excursion tickets which were not transferable. One *K* purchased an excursion ticket at a concession rate, travelled on the railway from *M* to *L* station and at *L* station handed the partly used ticket to one *G* who received the same with the intent of travelling with that ticket from *L* to *M*. Charges were preferred against *K* and *G* for unlawfully transferring a partly used ticket and receiving such a ticket respectively with the fraudulent intention.

Bye-law (6) of the Railway Company's bye-laws provides that "no person shall sell or buy or attempt to sell or buy any ticket . . .

or transfer or receive any partly used ticket or season ticket to or from any other person with intent that any person shall use the same for the purpose of travelling or conveyance upon the railway, unless the ticket shall at the time of issuing thereof purport to be transferable, and no person shall knowingly and wilfully use or attempt to use any ticket which has been sold, bought, transferred or received in contravention of this bye-law. . . " The bye-law was framed under the Railways Clauses (Consolidation) Act, 1845, S. 108 of which provides that the company can make bye-laws "generally for regulating the travelling upon or using the working of the railway" subject to the provision that "such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect." It was contended that the bye-law was *ultra vires* and invalid as it throws the net too wide inasmuch as it covers also cases in which no element of fraud appeared.

Held, that the bye-law was not invalid. The bye-law is intended to prevent buying and selling of tickets upon terms which will prevent the railway company from getting its fair and proper payment. A sum which is not paid to the company or its agent cannot be a fare, and a person who intends to travel with a ticket bought otherwise than from a servant of the company is intending to travel without paying his fare. A bye-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful.

WURZEL *v.* HOUGHTON MAIN HOME DELIVERY SERVICE, LIMITED; WURZEL *v.* ATKINSON AND OTHERS, (1937) 1 K.B. 380.

Road and Rail Traffic Act, 1933, *S.* 2, *sub-Ss.* (1) (*c*) *and* (4) *Motor goods carriage with C license—Carriage owned by a society—Incorporated and unincorporated societies—Carriage from colliery of coal to houses of members—Payment for same from their salaries—If the society guilty of using the carriage "for hire or reward."*

The Road and Rail Traffic Act, 1933, provides in S. 2, sub-S. (4) that "a private carrier's license shall entitle the holder thereof to use the authorised vehicles for the carriage of goods for or in connection with any trade or business carried on by him, subject to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward. . . . . " This licence is called '*C*' licence.

In the two cases the question came up this way. The first was the case of an incorporated society and the other was the case of an unincorporated society. The activities of the society were confined to the delivery to its members of coal supplied to the members from the colliery by the colliery company. For that business the societies owned motor goods vehicle with a '*C*' licence. The society

carried the coal by this vehicle and delivered it at the houses of its members and the charges for such deliveries were deducted from the wage of each member by the colliery company and paid to the society.

Held, that (1) in the case of the incorporated society, the society was a legal entity different from its individual members and therefore the carriage was used there "for hire or reward" by the society as it collected the charges from the member but in case (2), that is, of the unincorporated society, there was no limited company and therefore the society was not different from its individual members. As such the persons at whose houses the coal was being delivered were among the owners of the motor vehicles which were making the delivery and it cannot be said that they were having their coal carried in those vehicles for hire or reward because it will then mean that they were hiring from themselves or rewarding themselves.

STAFFORD *v.* KIDD, (1937) 1 K.B. 395.

Evidence—Admissibility of—Spouses living apart under a deed of separation—Birth of child afterwards—If wife entitled to let in evidence of husband's non-access—Russell *v.* Russell *rule—If applies after separation under a deed.*

Execution of a deed of separation by a husband and wife, together with evidence that the deed was acted upon by the parties, has the effect which a decree of judicial separation might have of getting rid of the presumption of legitimacy so as to admit of evidence of non-access being given by the wife, although such evidence, if accepted, would have the effect of bastardising the child. The case of *Russell* v. *Russell,* 1924 A.C. 687, has no application to such a case and evidence of non-access can be admitted.

UNITED DAIRIES (LONDON), LIMITED *v.* STIRLING, (1937) 1 K.B. 402.

Workmen's compensation—Workmen's Compensation Act, 1923, *S.* 9; *sub-S.* (4)*—Workmen's Compensation Act,* 1931, *S.* 1, *sub-S.* (1)*—Accident to workwoman—Loss of three fingers—Full compensation paid for some time—Application by employers to reduce—Dismissal of—Partial incapacity treated as total—No work in spite of attempts—Application two years later to review the prior order—No attempts by workwoman later to secure work—Ground for review.*

A workwoman *S* met with an accident in the course of her employment in 1932 and as a result lost three fingers of her right hand which were amputated. Compensation was paid for two years and in 1934 the employers reduced the compensation whereupon

she applied to have full compensation alleging that she tried but could not get any work. The Court then finding that she had taken all reasonable steps to obtain employment but failed to get one granted her full compensation treating the incapacity as partial under S. 9 of the 1925 Act. In 1936 the employers applied to review the order and diminish the payment alleging that since 1934 she had not tried to obtain any work, though they were advised that her hand had so far improved that she was capable of working. The medical evidence was that her hand was practically static and there was no material difference. But she herself admitted that lately she did not take steps to obtain employment.

Held, that the fact that she had made little or no effort to obtain any work was a change of circumstance since the previous hearing which the Court would take into consideration and review the prior order of 1934, treating the incapacity as total. The Court was therefore to find whether the conditions required by S. 9, still continued to exist.

BARKER *v.* ALLANSON AND OTHERS, (1937) 1 K.B. 463.

Practice and procedure—R.S.C., O. 16, r. 9—Common interest —Meaning of.

A suit was brought against the defendants as representing the general body of the members of a colliery lodge for recovery of the balance due in respect of the price of goods sold to various members of the said lodge. The lodge was a branch of a miner's association which was a registered union. The lodge at date of suit had 841 members. In 1921 there were 1093 members. The membership had since changed and the majority of those who were now members were not members in 1921. In 1921, 89 out of the members received goods from the plaintiff, such goods being supplied upon a form of voucher signed by the then secretaries of the lodge and bearing the lodge stamp. Of these 89 some had died, some had paid for the goods which they had received and some had ceased to be members and only 19 of them were still members. The plaintiff had till 1930 received several payments from the treasurer. In 1936 this suit was brought against *A*, the financial secretary, *T* the treasurer, *R*, the chairman and *K*, the general secretary of the lodge as representing all the members of the lodge claiming that the balance was payable by the lodge and out of its funds. The plaintiff applied for leave to sue under O. 16, r. 9, R.S.C., the defendants as representatives of the lodge. The rules of the lodge did not provide for such transactions.

Held, that the representation order under O. 16, r. 9, ought not to be made. O. 16, r. 9 says that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may be authorised by the court or a judge to defend in such cause or matter, on behalf or

for the benefit of all persons so interested". The defendants by representation have not the same interest in the case. The majority of the defendants would, if they had been named as defendants, have been entitled to prove that the goods were not ordered by them or with their authority as they were not members of the lodge when they were bought, others might have other defences like limitation, etc. Where there might be separate defences open to some members of the association and not to others, there would be no common interest within the meaning of the rule.

ATTORNEY-GENERAL *v.* COHEN AND ANOTHER, (1937) 1 K.B. 478.

Revenue—Stamp duty—Finance (1909-1910) *Act,* 1910, *S.* 73 *—Sale of 6 lots to one purchaser—All lots owned by one person—Lots separately sold in auction—Separate bids and separate abstracts of title—If one of a series of transactions.*

At a public auction certain dwelling houses and other premises were offered for sale in 12 separate lots belonging to different vendors. At the auction the defendants bought from the same vendor 6 lots. The defendant's bids were made in respect of each lot separately and separately sold. Two of the lots were for more than 500*l.* each and the others at less than 500*l.* each though in the aggregate it was for more than 500*l.* Six separate contracts were signed by the purchasers, and six separate deposits of 10 per cent. of the purchase price was paid by them. The contracts of sale were each separately stamped. Six separate abstracts of title were supplied. S. 73 of the Finance Act, 1910, provides that "the stamp duties chargeable under the heading 'conveyance or transfer on sale of any property' in the First Schedule to the Stamp Act, 1891 . . . shall be double those specified in that schedule, provided that this section shall not apply to . . . a conveyance or transfer where the amount or value of the consideration for the sale does not exceed 500*l.* and the instrument contains a statement certifying that the transaction thereby effected does not form part of a large transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value, of the consideration exceeds 500*l*". The conveyances each contained such a certificate.

Held, that the sale did not form part of a larger transaction or of a series of transactions in respect of which the aggregate value exceeds 500*l.* within the meaning of S. 73 and that therefore in the cases where the consideration was each less than 500*l.* the double tax could not be levied. The circumstances of the parties being the same, the times of transactions close and the places, the subject-matter of the various conveyances contiguous, are all casual matters which do not make it proper to say that they constitute parts of a series within the meaning of the section, in the absence of any evidence of inter-dependence.

UNION TRANSPORT FINANCE, LIMITED *v.* BALLARDIE, (1937) 1 K.B. 510.

Sale of goods—Factors Act, 1889, *S.* 8—*Purchase by agent on behalf of his principal of a car—Car let on hire by agent to an impecunious employee of the seller—Transaction colourable one—Agent aware of it—Possession continuing with the seller—Seller letting out on hire-purchase agreement to a third person—Third party so taking it in good faith—If purchasers can claim it from such party.*

The plaintiff company, in the course of their business, buy motor-cars in cash to let them under hire-purchase agreements to would-be purchasers who are not prepared to pay the whole price at once. In 1935 their branch Manager *T* bought for and on behalf of the company a motor-car from *C* and let it on hire to *F*, an employee of *C*. *F* had no private means of his own and was not in a position to buy a car on any terms. He was induced by *C* to sign on hire-purchase proposal on one of plaintiffs' company's printed forms under which 60*l.* had to be paid in cash and balance in 18 monthly instalments. *T* to help *C* to carry through the transaction, which he must have known was not genuine, drew a cheque in *C's* favour for 180*l.* the balance of the car's price. *F* had paid nothing, even the 60*l.* having been paid by *C. F.* signed a delivery form for having received delivery. The whole transaction was colourable in the sense that *C*, *F* and *T* never intended that *F's* part in it should be a real one. The car was with *C*, and was held by him in his own right and not as bailee for *F*. Some months later *C* as owner agreed to let the car to the defendant under a hire-purchase agreement, with an option to purchase it as per its conditions, in consideration of 140*l.* paid as advance and small monthly instalments. It was found that the defendant took the car in good faith, and without notice of any previous sale by *C*.

Held, that as a result of S. 8 of the Factors Act, 1889 the defendant got a good title. S. 8 says "where a person, having sold goods, continues, or is, in possession of the goods . . . the delivery or transfer by that person . . . of the goods . . . under any sale, pledge or other disposition thereof . . . to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same". At different stages of this transaction the plaintiff company and *F* had a right to possession of the car, but neither of them had exercised the right at the date of the delivery of the car to the defendant. *C* was not the bailee of *F*, as he never gave possession to *F* nor did he ever attorn to *F*. The original contract with *F* was a contract "personal to the hirer" and it cannot therefore be said that *F* was a nominee for *C*.

BEETHAM *v.* JAMES, (1937) 1 K.B. 527.

Seduction—Girl living with her parents—Parents living together but unmarried—Putative father head of household—Girl doing household duties living with father—Action for seduction, by father—If maintainable.

In 1935 the defendant seduced the plaintiff's daughter by reason whereof she became pregnant. Her parents were living together but were unmarried. The daughter was then 22 years of age and was living with them and actually doing household duties for the father.

Held, that the suit for damages for seduction was maintainable by the father, as he has lost the services of the daughter. The basis of the action of seduction is loss of services from the seduced. It is not because a man is the girl's father and it is not because he is married to her mother that the services are presumed to be rendered to him, but because he is head of the household. The plaintiff was just as much the master of his household as he would have been if he had been married at all times to the girl's mother. He has assumed the duties of a husband and the mere fact that they had not been married cannot affect his position as master of the house. This is not a case of a man paying mere occasional visits to his mistress, when there may be some difference.

FARNHAM *v.* FARNHAM OTHERWISE DANIELS, (1937) P. 49.

Marriage—Petition for nullity of marriage—Evidence of frigida quoad hunc *of woman to the husband—Woman giving birth to a child through another man—Evidence if admissible.*

The marriage between the parties Mr. *F* and Miss. *D* was celebrated in 1933 but has never been consummated because the woman *D* is *frigida quoad hunc* in regard to the petitioner *F*, that is, incapable of performing the intercourse with *F*. But nevertheless she has given birth to a male child in 1935 by intercourse with another man. The husband *F* presented a petition for nullity of marriage. The question was if evidence of intercourse with another and non-access by *F* could be admitted.

Held, that the suit here is not for divorce but for nullity. The issue of adultery or no adultery is not in issue in the case. It may be that, if non-consummation be established, it will result in a finding of adultery and bastardize the child. But *Russell* v. *Russell* does not deal with this class of nullity suits.

THE KAFIRISTAN, (1937) P. 63.

Salvage—Shipping—Collision—Vessel of salving ship's owner partly to blame for the collision—Salving ship's owners not entitled to salvage remuneration.

The owners of a vessel rendering salvage services to a vessel which has been in collision are disentitled to salvage remuneration by reason of the fact that another vessel belonging to the same owners is partly to blame for the collision, because the necessity for these services is partly occasioned by the negligence of their agents in charge of the colliding vessel and no man can profit by his own wrong. The Maritime Conventions Act, 1911, S. 1, has not made any difference in the law.

JOTTINGS AND CUTTINGS.

The new Chief Justice took his seat on the Bench sitting with Mr. Justice Varadachariar. The Advocate-General, in welcoming the Chief Justice on behalf of the Bar, said:—

"In extending to you, on behalf of the Bar, a most hearty welcome", said Sir Alladi, "on the eve of your entering upon the duties of your high office as Chief Justice—an office whose history goes back to the beginning of the 19th century—I crave your Lordship's indulgence in giving expression to a few sentiments. There is no need to indulge in any conventional eulogy, as your reputation has travelled to us much in advance of you, and the echoes of the warm appreciation of your career and work in Burma by the Bar and the litigant public have been heard here. We have come to know you as one who has had a leading and a most lucrative practice at the Bar, who, impelled by a high sense of duty and in accordance with the best traditions of the English Bar, had accepted a place on the Bench and who, within the few years of his career on the Bench, had earned the distinction of being an erudite and independent Judge. The Rangoon Law Reports which are as widely read here as the law reports of the other High Courts in India bear eloquent testimony to your work on the Bench. We have heard of your cordial relations with every section of the Bar and the uniform courtesy which you have shown both in and outside court. Your Lordship will not find yourself in altogether unfamiliar surroundings, as Burma was, until recently, a part of British India governed practically by the same system of laws as this presidency and as its capital city, which I believe to a material degree contributes to the work of the Rangoon High Court, is largely peopled by the banking and commercial communities from this part of India and by the labour population from this presidency.

"In the course of my remarks I may be pardoned if I make a brief allusion to the work of the Bar and its place in the judicial administration of this presidency. Within the short span of its existence, compared with the Bar in England, it has built up a big tradition. Both in the forensic field and in the Councils of the country, the profession in Madras has won renown and made a

great name for itself. Sir V. Bashyam Iyengar, Sir S. Subramania Aiyar, Sir C. Sankaran Nayar, Mr. Justice P. R. Sundaram Aiyar, Mr. V. Krishnaswami Aiyar, Sir K. Srinivasa Iyengar and Sir P. S. Sivaswami Aiyar—not to mention some of the brilliant leaders who are still in active practice—are persons of whom any enlightened country could be proud. From the ranks of our bar have been recruited not merely some of the great Judges in the past, but some of your distinguished colleagues. In point of forensic attainments and legal equipment the Bar in Madras is not behind the rest of India. Speaking with an intimate knowledge of the conditions of the Bar, I am in a position to state that there are young men at this Bar who in point of legal erudition and attainments are not very much behind their senior compeers and who, given the proper opportunity, will give an excellent account of themselves. With possibly rare exceptions, our relations with the Bench have been uniformly cordial and marked by a mutual understanding and respect for each other.

"I am not indulging in any platitude when I give expression to a deeply cherished conviction of mine that in countries permeated by British Jurisprudence, the Bench is closely linked up with the Bar and that neither in practice nor in theory can one think of a strong Bench unless there is a strong Bar. They are alike engaged in maintaining and promoting justice which is the corner stone of civil society. In the words of a distinguished lawyer before the Canadian Bar Association, 'There is no institution of such vital and supreme importance to the State as the existence of a fearless judiciary and a vigilant and independent Bar.' In every sphere of your Lordship's work, whether in any scheme of reform of the machinery of administration of justice, of the rules of the Court, or of the speeding up of legal business, let me assure you of our hearty and sincere co-operation.

"The Bar Council is contemplating a comprehensive scheme of reform of legal education in this Presidency and in their endeavours, I have no doubt, they can confidently look forward to your active sympathy and guidance. Your Lordship is entering upon your duties at the commencement of a new chapter in the constitutional history of India and Indo-British relations. In the new dispensation and with the unfoldment of democracy, the High Courts in India have as important a place to fill as in the past, if not a more important one, as guardians of the liberty of the individual and public order. Let me conclude by once again extending to you a hearty welcome and conveying to you our good wishes."

Chief Justice's Reply.—In reply, the Chief Justice said:—Mr. Advocate-General, I thank you for your very kind words of welcome which you have addressed to me on behalf of the Bar. It is very gratifying to me to know that in taking up the office of the Chief Justice of this great High Court, I do so with the good

wishes of you all. I come among you with knowledge of the manners and customs of some of the people, but much will be entirely new to me and therefore at the beginning, I shall want your special assistance. I am sure that I can count on that in full measure and your assistance, gentlemen, will be of great assistance indeed.

Having been for 30 years a member of the profession which we all have the honour to belong, I appreciate how essential it is for the proper administration of justice that there should be a strong Bar. I know that the Bar of this Court stands second to none. The Court is particularly fortunate in this respect. Another important factor in the administration of justice is the promotion of right feeling between the Bench and the Bar. I am happy to think that that feeling exists here and it will be my concern to maintain it.

Gentlemen of the Bar, you have my assurance of all the help I can give you in dealing with the problems connected with the profession. I look forward to happy co-operation with you throughout my term of office. Mr. Advocate-General, I thank you once more for your kind welcome.—*"The Hindu", 19th July, 1937.*

Presumption of Death.—The disappearance of a famous author-actor from an Atlantic liner in circumstances which seem almost conclusively to imply his death will remind practitioners of the problem that such a disappearance gives rise to in the English probate courts. Although an inquest can be held, and a man tried for and convicted of murder in the absence of a body, yet the English Courts, for the purpose of probate and administration, are reluctant in all cases of disappearance to accept circumstantial evidence of the death. After seven years they will allow a presumption of death. In exceptional cases that period may be shortened. And in one of those exceptional cases, arising from the disappearance of a man from a Channel liner, the presumption was reluctantly allowed after three years of waiting and advertisement. Needless to say, the proceedings of Crown Courts and Coroners' inquisitions are not relevant to and do not influence the placid deliberations of the Courts of Probate and Chancery. Nor do the Courts in similar cases to this seem to apply, as it should be applied, the principle of circumstantial evidence.—*L.J., 1937, p. 180.*

Gretna Green Marriages.—If, as seems likely, the recommendations of the Committee appointed at the end of 1935 to consider the law of Scotland relating to the constitution of marriage are carried into effect, an end will be made to the extreme laxity which has characterised the formalities, or lack of them, attending civil marriage North of the Tweed. Till now writers on Scots Law have had to distinguish between regular and irregular marriages, the former being preceded by the publication of banns or after notice to the registrar, the latter being the mere indication between the

parties of their intention to take each other as husband and wife. The latter were frequently spoken of as Gretna Green marriages from the fact that in the old days runaway couples from England crossed the Border to this Dumfriesshire village where, in the so-called blacksmith's shop, they exchanged vows. This industry received a severe blow by the passing of Lord Brougham's Act, which enacted that after 31st December, 1856, no irregular marriage should be valid unless one of the parties had lived in Scotland for twenty-one days next preceding the marriage or had his or her usual residence there at the time. There was no particular virtue in the choice of Gretna Green for such marriages; its merit or, perhaps we should say, demerit, being merely its proximity to the Border. It has sometimes been said that Lord Eldon contracted a Gretna Green marriage, but this is inaccurate. It is true that he contracted an irregular marriage in the sense that it was not preceded by the publication of banns, but the ceremony was actually performed by a clergyman in a Haddingtonshire village, and it is of interest to add that the young couple thought it prudent to regularise matters by going through a fresh ceremony in St. Nicholas, Newcastle-on-Tyne. Lord Brougham's Act, it will be observed, did not abolish irregular marriages in Scotland; it is now proposed to do this by permitting civil marriage much on the same lines as in England, that is, by some authorised official after due compliance with the Marriage Notice (Scotland) Act, 1878. Apart from other grave objections to which these irregular marriages were obnoxious, difficulties frequently arose in connection with establishing the proof of their existence.—*S.J., 1937, p. 145.*

Young Delinquents.—In the course of a recent speech, Lord Hewart made reference to the remarkable change which has taken placed in the past half-century in the courts in the direction of humanity, and to the great development in human temper in dealing with persons said to be criminals. Particular emphasis was laid upon the change which is observable in the manner in which young offenders are dealt with. It might be (it was said) that, as some claimed, the tendency to take care of the young had gone too far, but after all there could not be a more grave or appalling problem. In the Court of Criminal Appeal, the speaker continued, it was often revealed that a matured man, sometimes a grey-headed man, who was charged with a very serious offence had been first sent to prison when he was under the age of sixteen years. That was a system not so much for the punishment of crime as for the manufacture of criminals. Allusion was made to difficulties experienced in finding employment by an honest man with a clean record—difficulties which were much greater for a man whose only reference was the prison Governor. Too much could not be done to save the young from the association and contamination of crime. Once a boy entered prison and mixed with those with whom he must mix,

his chances of a decent life were definitely diminished. The learned Lord Chief Justice did not think that all who were concerned with the administration of the Criminal Law in Police Courts, quarter sessions and in the Court of Criminal Appeal could exert themselves too much to save, if they could, the young offender from going to prison for the first time. Patience and perhaps a little imagination were often necessary, and sometimes the expedient of probation. Let them not think, the speaker concluded, that too much was being done, or could be done, to save the young from a life of crime.—*S.J., 1937, p. 205.*

Income Tax: Compromising Claims.—During the hearing of a recent case in the Chancery Division Bennett, J., qestioned the legality of the Income Tax Commissioners compromising claims. It was, the learned Judge said, of importance to know who the persons were who could say to a company "you are relieved of part of your income tax." The commissioners in that case, it was intimated, were giving up a claim against a tax payer to the extent of £ 120, with the possible result that some other taxpayer might have to pay more. In response to counsel's statement that the Commissioners did compromise claims, the learned judge said that he wanted to know what authority they had to free a tax-payer from his liability. Had Parliament given them power to do so? The matter is further best alluded to in *oratio recta* following the report in *The Times*: "Counsel: (Parliament) has given them power to collect the tax. His Lordship: Yes, but has it given them power tot remit it as regards a particular individual? Parliament may have given someone this power. If not I think Parliament only has the right to say so. I don't care how many times it has been done. There is an important point of principle involved. Counsel: The practice of compromising these claims had never been challenged before. His Lordship: It is challenged now. When Parliament says that a tax-payer must pay, can anyone except Parliament say that he need not?" It was suggested by counsel that taxation was payable to the Crown, and the Crown must have power to remit it, but the learned judge expressed doubt on the point.—*S.J., 1937, p. 206.*

Brighter Prisons.—Those enlightened reformers who are so anxious to turn prison into a home from home have gone far, but recent reports from beyond the seas contain the germs of ideas which must be new even to them. First, take Detroit, where a gentleman, suspected of being the executioner of a secret society, awaited trial in a cell so situated that not only could he exchange greetings with a young lady playing a piano in the women's sewing-room, but she could accept his invitation to climb up and see him some time. Here is her tribute to the accommodation: "He certainly had a nice room with a bathroom and radio and every-

thing. Whenever a policeman came through, I ducked behind the shower-bath curtain.'' That leads us to Paris, where a compassionate gaoler ordered the social life of his charges with a truly Gallic discretion, setting aside a cell to be placed at the disposal of prisoners for the reception of ladies who called on them. In the circumstances, it is astonishing that any of his guests should have wanted to escape, but one succeeded in disappearing, and the Court took rather an unfavourable view of the system of hospitality. Perhaps, therefore, our own little Guernsey is the best of all. If recent reports are true, some prisoners have been able, by secret possession of duplicate keys, to walk out at night, going home or even attending dances. But (fine tribute to their temporary abode!) they were always back by morning.—*S.J., 1937, p. 214.*

Sir Harry Trelawney Eve.—Just before we went to press last week the announcement appeared that Sir Harry Trelawney Eve had been made a Privy Councillor on his resignation of the office of judge of the High Court of Justice. Sir Harry was born in October, 1856, and called in 1881. He took silk in 1895, and was appointed to fill the vacancy on the Bench caused by the death of Mr. Justice Kekewich in the year of Queen Victoria's second Jubilee. Some members of the Profession will remember him as one of the very busiest of Chancery juniors. They may recall many a Friday morning in, say, Mr. Justice Chitty's Court when the judge would ask with a twinkle, ''Do you move, Mr. Eve?" and Mr. Eve always did move, having numerous instructions to do so in the Court in question as well as in each of the other Courts in which motions were due to be heard. There was something naval about his gait and fresh-coloured friendliness, and litigation managers showing articled clerks round the Courts for the first time always told them how much time Mr. Eve found for the open air and how he always took his wife and family for their holidays in a caravan, which was then a far more uncommon method of spending a holiday than it has now become. Since those days as a junior, which ended about thirty-five years ago, a long, strenuous and most successful career as a leader and judge has given pleasure to his Lordship and to all with whom he has come in contact professionally, and members of both sides of the Profession most assuredly wish that pleasant activity and happy reminiscence will occupy a period of leisure that has been so thoroughly well earned, and, fortunately for lawyers generally, so long postponed.—*L.T., 1937, p. 201.*

Mr. Justice Simonds.—From the, for the most part, unspectacular nature of their work, Chancery counsel do not as a rule have from the general public the tribute of admiration which often falls to the lot of leaders in Common Law and Divorce practice, but to the individual concerned what matters is the more

discriminating judgment of the Profession itself. The appointment, to fill the vacancy created by the regreted resignation of Mr. Justice Eve, of Mr. Gavin Simonds, K.C., who became in some measure known to the outside public by his share in last year's Budget leakage Tribunal of Inquiry, was far from unexpected and has, needless to say, been heartily welcomed by his former colleagues in both branches, with whom he has for a number of years deservedly had the reputation of a distinguished equity lawyer. The choice of the authorities is an excellent one, too, so far as temperament and personality go. Not the most eager champion of youth on the Bench—and they are many—can cavil at the age at which judges have been appointed of recent years. The fact that the new appointee, in spite of his considerable experience, is still only in the mid-fifties, promises well for the vigorous and successful discharge of what we think and hope will be congenial duties. Mr. Justice Simonds has already taken his place in the Court so long associated with his predecessor, Mr. Justice Eve, on whom, as already stated, has been conferred the honour of being sworn of His Majesty's Privy Council.—*L.T., 1937, p. 201.*

Actio Personalis.—The action against the executors of a dead man, who was in effect charged with gross dishonesty and fraud, has now been determined by a final judgment of Mr. Justice Goddard (*London Assurance, etc.,* v. *Clare, etc., Times, March* 17). The jury could not agree as to whether the deceased wigmaker, whose name and reputation were worldwide, was actually guilty of arson, but they did convict him, long after his death, of having put forth fraudulent claims, which, in the circumstances, is nearly as grave a charge. The deceased artist was not heard. He was not there to defend himself, and to many men it must always seem unsatisfactory that a man who might have been capable of excusing himself should be condemned after death has sealed his lips. The old maxim which killed personal actions with the death of the plaintiff or defendant has recently been expunged from our law, and we are by no means satisfied that the change is wholly for good. Many of our readers only know of the deceased artist by his witty memoirs, which have lately whiled away an idle afternoon for a large circle of Englishmen. Those who have read them will certainly wish that he had been still alive when the recent action was heard.—*L.J., 1937, p. 195.*

Mr. Justice Swift on Divorce Law.—"To my mind the divorce laws of this country are wicked and cruel". So said Mr. Justice Swift at the Birmingham Assizes on Tuesday, stung to righteous indignation at the proceedings in a case before him in which a daughter had been called as a witness to prove her mother's adultery. The Marriage Bill has, we believe, passed through Committee, and those who are in charge of it will doubtless have regard

to the learned Judge's words. Whether Parliament will have regard to them is another matter. For judicial utterances have varied sequels. When divorce was still impossible in England except by Act of Parliament, it was a Judge, Mr. Justice Maule, who, as Sir Edward Parry said in *The Law and the Poor,* "woke up the country to the fact that there was a divorce problem, and that it wanted solving". This was in the case of *Reg* v *Hall,* tried at Warwick in 1845, but Maule, J., used sarcasm and not invective, and the circumstances—it was a bigamy prosecution—allowed that method. "The scorn and irony that Maule poured on the law of divorce roused the public conscience"; and so there was a Royal Commission in 1850 and a Divorce Act in 1857.—*L.J., 1937, p. 195.*

Lord Gorell's Commission.—Some sixty years after *Hall's* case there was another arresting judicial comment on matrimonial law, which seemed likely to produce equally important results, but here expectation has been disappointed. In *Dodd* v. *Dodd* in 1906, Mr. Justice Barnes found himself faced with the immorality due to separation orders, and he delivered a judgment which pointedly called attention to the evil results of the law. The law of divorce and separation, he said, "is full of inconsistencies, anomalies and inequalities, amounting almost to absurdities. . . . Whether any and what remedy should be applied raises extremely difficult questions, the importance of which can hardly be over-estimated, for they touch the basis on which society rests"; but he suggested that reform would "enhance that respect for the sanctity of the marriage tie which is so essential in the best interests of society and the State". This led to the Royal Commission of 1909, of which Mr. Justice Barnes, who had then become Lord Gorell, was chairman, but, as is well known, the majority Report of 1912 was frustrated by a small dissenting minority, and the powerful advocacy afterwards of Lord Birkenhead and Lord Buckmaster was unable to prevent this unfortunate result. Will Mr. Justice Swift's criticism have any greater effect?—*L.J., 1937, p. 196.*

More Suggestions for Law Reform.—The perfection of the law is, no doubt, "that far-off divine event to which the whole Creation moves". And if we do not arrive there within measurable time it will not be for want of suggestions. We have had the Business of the Courts Committee, with its four Reports and Lord Wright's thorough-going programme; we have had the King's Bench Commission, with its recent Report, limited to the King's Bench Division because the Chancery Division, somewhat prematurely, perhaps, is assumed to have already reached perfection; we have a new County Courts Act and an infinity of rules, still based, however, on a very limited jurisdiction; and we have the Revision of Law Committee, whose chief attribute is that it works quietly, and therefore gets things done. And now Prof. Eastwood,

of Manchester, is collecting for the *Nineteenth Century* a series of articles on "The Reform of the Law", of which the first, "The Problem of Civil Litigation", by Mr. Colin A. Cooke, appears in the March issue. Mr. Cooke does not start hopefully. "The conditions in which law reform in England can take place are limited and this applies particularly to civil litigation". The three defects are "delay, cost, and precariousness". Sometimes we hear of cases being speedily reached and speedily disposed of; but they are exceptional. As to cost, there is no question; it is the chief reason why the ordinary man does his best to avoid the Courts. By precariousness, we presume Mr. Cooke means the uncertainty of the result. Litigation may mean that the parties are, at the expense of one or the other of them, enabling the Judge to make new law.—*L.J., 1937, p. 196.*

Arbitration or the Courts?—Mr. Cooke tilts also at the length and complexity of legal documents. "I have seen an agreement between two firms in a small matter transformed from one sheet signed by the parties to a formidable document of 20 pages after reference to the law. The parties signed this with the deepest misgivings, each feeling that he had been trapped into indefinite legal liabilities by the other". But it is quite possible that the one sheet contained possibilities of misunderstanding which were avoided by the longer draft. Clients go to lawyers in order that legal snags which they would not themselves foresee may be avoided. In fact, modern drafting aims at the "simplicity and provision only against practical possibilities to the exclusion of improbabilities", which Mr. Cooke wants. As to procedure, he recognises that the King's Bench Commission has made good suggestions, but he doubts whether they would stem the drift from the law, either to arbitration, or to resignation to unjust demands. "They do not meet the fundamental objection of the ordinary man to the legal machine, that what should be a good servant has become a bad master". Mr. Cooke's own remedy is the extension of Commercial Courts to the large provincial towns, in such a manner, however, as not to interfere substantially with the centralised administration of justice in London; and he would meet the drift to arbitration by giving the judges themselves power to hear disputes sitting as arbitrators in Court, within restrictions on outside publication. But a judge can already sit as an arbitrator, and then there is no appeal Mr. Cooke says that there are limits to the utility of the precedent system. There may be, but to abandon it or, whittle it down would increase the "precariousness" of the law.—*L.J., 1937, p. 196.*

Estoppel.—The Judicial Committee have recently decided an interesting point on estoppel and statute law (*Maritime Electric Co.* v. *General Dairies, Ltd.*, (1937, 1 All.E.R. 748)). The appellants were electrical undertakers in the Province of New Brunswick, and

the charges which they could make for electrical energy were fixed by a law of that Province. The respondents were large consumers and in due course received bills for what was due to the company. These bills were incorrectly made out. The error was serious and one wonders how it was not discovered for over a year; for it resulted in bills being sent in and paid which showed no more than one-tenth of the correct statutory charge. The appellants finally discovered their mistake, sued for proper payment and recovered in both the provincial Courts. This decision was set aside by the Supreme Court of Canada (1935, S.C.R. 519), but has now been restored in Downing Street. Lord Maugham, in giving the decision of the Committee, based himself on a valuable passage in the Hailsham Edition of *Halsbury* (vol. XIII, p. 474), in which the gist of the cases is aptly expressed. Nobody can, by any sort of representation, raise an estoppel which will create a state of affairs which he is legally unable to create. If the law says that an undertaker must charge so much for electrical energy he cannot, by sending in erroneous bills, preclude himself from claiming later what the law declares to be his due.—*L.J., 1937, p. 197.*

A Legal Genius.—Of the small and select band of writers on English Law to whose work the word "genius" could with any accuracy be applied Frederic William Maitland, who passed away twenty-one years ago, "read ere his prime", stood at the very top. Though dead, we may say, he yet speaketh, as is testified by the recent republication or several of his works—Selected Essays, Equity, and Forms of Action at Common Law. These works, his unceasing labours for the Seldon Society, his share in the learned volumes of Pollock and Maitland, all attest his abiding influence in the sphere of law and legal history, and his; unlike the generality of Law books, can be read and re-read time and again not only for professional instruction but, to use Edward Fitzgerald's famous phrase, "for human delight". How he could arouse enthusiasm in his hearers is witnessed to by him who declared that Maitland made you feel that the history of law in the twelfth century was the only thing in life worth living for. To the Year Books, which the ordinary lawyer regards with awe begotten of ignorance, Maitland felt very much as did Serjeant Maynard, of whom we are told that he "had such a relish that he carried one in his coach to divert him in travel, and said he chose it before any comedy." To his wealth of learning Maitland added a keen sense of humour, which he utilised with happy effect to light up some humdrum topic or to poke a little fun at the idiosyncracies of members of the profession, as, for example, when he told us that "Quasi" is one of the few Latin words that English lawyers really love.—*L.T., 1937, p. 229.*

His Humour.—Scattered through the pages of this work on Justice and Police are many shrewed observations touched with

that delicate humour that was one of Maitland's priceless possessions. Thus, in touching on the old ecclesiastical courts he tells us that they did a good deal of business that was not of a very spiritual kind; that in the fifteenth century the suppliants for extraordinary relief addressed their petitions not to the King, as had formerly been the practice, but to the Chancellor, being couched in the humblest tone, asking relief for the love of God and that peerless Princess, his Mother, or for His sake who died on the rood-tree on a Good Friday, and if the Chancellor will give ear his poor petitioner will ever pray for the increase of his good Lordship. The suppliant is poor, old, sick, his adversary is rich and powerful, will bribe and intimidate, or has by accident or trick obtained some advantage of which he cannot be deprived by the ordinary courts. What other writer would have given us those picturesque details which illustrate as nothing else could the grievance of the petitioner and his faith in the power of the Chancellor to set things right. Later the Chancery was not held in such high repute, no one but a Chancery lawyer, according to Maitland, having a good word to say for it; and he points out that Blackstone, though civil to this as to all existing arrangements, reserved all his hymns and laudatory reflections for courts whose procedure was more in harmony with the genius of our nation.—*L.T., 1937, p. 230.*

On the House of Lords.—In his chapter dealing with the House of Lords and the Chancellor, Maitland reminds us of what we are apt to forget, that in the eighteenth century it became customary for the Lords to leave their judicial business to be done by such only of their number as were distinguished lawyers. Occasionally, it is true, the lay Lords, as contrasted with the Law Lords, interfered, and as late as 1844 certain lay members of the House were only with difficulty dissuaded from meddling with some grave questions of law arising out of the trial of Daniel O'Connell; but they were disuaded. In a foot-note he adds this: "On the 9th April, 1883, the case of *Clarke* v. *Bradlaugh,* being before the House, three Law Lords were for reversing the judgment, one for affirming it; Lord Denman, who must be accounted a layman, expressed his agreement with this one Law Lord. (The Times, 10th April, 1883); but this incident does not appear in the journals of the House, and the judgment was reversed without any formal division''. To this it may be added by way of foot-note that it would appear to have occurred even late into last century for a lay peer to be called in so that a quorum might be constituted. Earl Spencer in expressing his views in *Re Lord Kinrose,* (1905) A.C. 468, where it was resolved by a Committee of Privileges that a peer is entitled to appear as counsel in an appeal to the House of Lords but not before the House when sitting for the trial of a peer on a criminal charge as the court of the Lord High Steward, reminded their Lordships that when he was a very young peer he

was called in on one occasion so that a quorum might be constituted for the hearing of an appeal. Of course, he did not take any part in the actual decision, although theoretically there was nothing to prevent him doing so.—*L.T., 1937, p. 230.*

BOOK REVIEWS.

THE LAW OF TRADE AND MERCHANDISE MARKS IN INDIA by S. Venkateswaran, D. Sc., Examiner of Patents, Patent Office, Calcutta, with a foreword by the Honourable Sir Courtney-Terrell, Kt., Chief Justice, Patna High Court, 1937. Price Rs. 20.

This is, so far as we are aware, the first treatise on the subject in India. The subject is not one familiar to the ordinary lawyer and there are not even lawyers who have specialised in this branch of law, as in the west. The Law of Trade Marks is bound to be of greater importance in the years to come when this country becomes more industrialized. The lawyers and businessmen alike here owe a special debt of gratitude to Dr. Venkateswaran to have produced amidst his arduous official duties a legal treatise of the first magnitude. The learned author has shown most clearly in the first few chapters how the common law remedy of a passing-off action and a criminal prosecution under the Merchandise Marks Act are cumbersome and expensive in their nature and do not afford a sufficient or speedy protection to the businessman who has been injured in his trade. The difficulty of producing evidence of user and reputation by the plaintiff to establish his title to a trade mark would be easily obviated by enacting and putting into operation a law similar to the one in England by which the production of a certificate of registration provided for by the Act would be *prima facie* proof of title to the trade mark shifting the onus on to the defendants. The learned author puts forward a strong case for legislation on the lines of the English Statute and we agree entirely with the author in his plea. In the later chapters of the work, the learned author deals with the law in India on the subject as it is at present in all its aspects with thoroughness and accuracy. All the cases in England and India on the subject have been referred to in their appropriate places. Then follows a commentary on the Indian Merchandise Marks Act. There are valuable appendices giving all the allied and useful enactments and forms of practical utility. It is the more remarkable that a legal text book of such excellence should be from the pen of one who is not a lawyer by training or profession but a high official in the Patent Office. We are confident that this treatise will be widely used by lawyers and judges and businessmen who have to deal with the subject. To the legislator and the legal reformer, the opening and closing chapters will be of great interest and instruction.

WILLS ON CIRCUMSTANTIAL EVIDENCE by Dr. M. Krishnamachariar, M.A., M.L., Ph.D., seventh edition. Price Rs. 10.

"Wills on Circumstantial Evidence" is a text book of high authority on the subject and passages from it have passed into the judgments of the highest Courts in England and elsewhere as clearly setting out the law on the various points. We are therefore indebted to Mr. Gattie for the seventh edition after nearly quarter of a century of the prior one. The book under review is of special interest to this country as Dr. Krishnamachariar, the well-known writer of books on legal subjects has added copious notes on the corresponding Indian Law below the text of the English edition of the work. Since the publication of the last edition, various statutory enactments and judicial decisions have appeared and they have necessitated the alteration of certain parts of the text. We have no doubt that the book will be welcomed by lawyers and judicial officers in this country.

MUSLIM LAW AS ADMINISTERED IN BRITISH INDIA by Kashi Prasad Saksena, M.Sc., LL.B., with a foreword by Sir Saiyid Wazir Hasan, Ex-Chief Judge, Chief Court of Oudh, Lucknow, 1937. Price Rs. 14.

This is a most comprehensive treatise on the Muslim Law. The learned author has the advantage of having been a Professor of Law in Cawnpore which would have enabled him to study its juristic aspects, in addition to being a practising advocate. The learned author has in this work given an exposition of the Islamic system of law from a comparative, analytical and juristic point of view. The subject has not been dealt with in a codified form, a method which is adopted in some of the modern text books which though it may clearly set out the propositions of law will not bring out their history or the reason underlying them. On the other hand, he has adopted the method of a running commentary on the subject interspersed with discussions of basic principles on which the law has been founded. He has had the advantage on various points of the suggestions of the great Muslim Judges in Northern India. Such as Sir Shaw Sulaiman and Sir Wazir Hasan, the latter of whom has contributed a foreword to the work and has said that the work has been compiled with thorough research and keen insight into the principles of Muslim Law and that it is thoroughly reliable. He suggests that it will occupy an eminent position among the treatises on Muslim Law. He has compared it favourably with that of the great work of the late Mr. Ameer Ali on the subject which however was written many years ago. With such high praise, we are sure that the book will be found invaluable as a treatise on Muhammadan Law by lawyers and Judges.